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Recent jurisprudential developments on the subject of surrogate motherhood: The cases *Mennesson and Labassee versus France* before the European Court of Human Rights

I. Preface

Two rulings of the European Court of Human Rights (hereinafter ECHR) were simultaneously made public on 26th June 2014, both of which on the topic of surrogate motherhood. The first concerned the *Mennesson vs. France* hearing, whereas the second the *Labassee vs. France* hearing. The facts in both cases bear a similarity, but since the reasoning of the former case is more thorough than the latter, this paper has been written on the basis of the former case, during the analysis of which though the reader will have his attention drawn to the similarities in the reasoning of both cases (references in parentheses).

II. The facts of *Menesson vs. France* case

In the *Menesson vs. France* case, a French married couple, in the wake of several failed attempts to procreate by means of homologous artificial insemination, decided to try heterologous for the wife artificial insemination, i.e. egg donation, combined with transfer of the fertilized eggs into the womb of a gestational carrier. To effect the undertaking, the couple travelled to California, where they entered into a surrogate motherhood agreement. Therein the couple brought the matter before the Supreme Court of California, which by virtue of a ruling issued on 14/07/2000 acknowledged the intended spouses as the genetic father and the legitimate mother respectively of the twins to be born. The birth took place on 25/10/2010 and in accordance with the aforementioned court ruling the relevant birth certificates were drawn up, followed by the issuance of American passports for the twins by the American federal authorities, quoting the French couple as their parents.

III. The course of *Menesson vs. France* case

In early November 2010, the husband proceeded to the French Consulate in Los Angeles, for the purpose of having the birth certificates of the twins transcribed, so that the family return to France. His request was rejected by the French consular officials, on the grounds of the husband's failure to provide corroborative evidence of his wife's labor. A case file was thus forwarded to the Public Prosecutor's Office in Nantes, wherein a thorough investigation of the case was launched.

Meanwhile, on 25th November 2002 the birth certificates on the Public Prosecutor's Office instructions were transcribed at the Registry Office of Nantes. Rather than granting the request of the couple, the reason for such transcription was paradoxically the formal filing of the case on the initiative of the Public Prosecutor before the Court of First Instance with a request that a ruling be issued annulling such transcription. The core point made by the Public Prosecutor Office was that the surrogate motherhood agreement is null and void, insofar as it contravenes the public order principles of inalienability of the human body and personal status (Menesson vs. France, § 18).

By virtue of a ruling issued by the Court of First Instance of Créteil on 13/12/2005, such action of the Public Prosecutor was judged inadmissible, insofar as the Court deemed inconceivable the Public Prosecutor's invoking public order, which he had previously disrupted by his own actions, all the more since under Article 47 of the French Civil Code the Public Prosecutor is entitled to review the legality of Registry Office acts and eventually reject the request for transcription (Menesson vs. France, § 19).

In parenthesis, it should be mentioned that Article 47 of the French Civil Code had been amended between the moment of birth of the twin girls and the time when the rulings at issue were rendered. More specifically, at the time of their birth (25/10/2000), the wording of Article 47 was as follows: "*Any act relevant to the civil status of French and foreigners issued abroad attests, if drawn up in the form in use in the respective countries*". Following its amendment, effective as of 27/11/2003, the same Article reads as follows: "*Any act relevant to the civil status of French and foreigners issued abroad attests, if drawn up in the form in use in the respective countries, unless other acts or data held, external data or information deriving from*

that same act prove that such act is irregular, falsified or the facts declared therein do not correspond to reality" (Menesson vs. France, § 31 = Labassee c. France, § 20).

By virtue of its ruling of 25/10/2007, the Court of Appeal of Paris validated the ruling of the Court of First Instance, on the grounds that the request on the part of the Public Prosecutor to annul the transcription of civil acts is contrary to the international public order. Moreover, the Court accepted the accuracy of data on the litigious acts, in view of the ruling issued by the Supreme Court of California on 14/07/2000.

By virtue of its ruling of 17/02/2008, the French Supreme Court annulled the aforementioned ruling of the Court of Appeal, the ratio decidendi being that the Public Prosecutor has a legitimate interest in acting towards the annulment of the transcribed acts, and therefore remitted the case to be heard anew before the Court of Appeal of Paris in an altered composition.

In response to such remittal, the Court of Appeal of Paris held a new hearing, which led to the issuance on 18/03/2010 of a ruling whereby the transcription of the litigious acts was annulled, on the fundamental grounds that the ruling of the Supreme Court of California, which indirectly legitimized a surrogate motherhood agreement considered null and void under Article 16-9 of the French Civil Code, had been contrary to the French perception of international public order. Equally negative were the judges as to the possibility of the invocation of the principle of primacy of the child's interest to remedy the illegitimacy of a procedure deriving from positive law, whilst reminding that an impossibility of transcription does not deprive the twins of their American nationality.

The request for cassation lodged by the couple against the new Appeal Court ruling was eventually overruled by virtue of a ruling issued by the French Court of Cassation on 06/04/2011, whereby the latter essentially sustained the reasoning of the Court of Appeal. With all domestic remedies available exhausted, the spouses decided to submit an individual application before the ECHR.

IV. The facts of *Labassee vs. France* case

The *Labassee vs. France* case concerns another French married couple, which due to an infertility issue of the wife decided to have recourse to surrogate

motherhood. To that end, on 20/06/2000 the couple entered into an agreement with the International Fertility Center for Surrogacy in the USA and on 29/10/2000 they concluded a new agreement with the aforementioned Center and a surrogate mother and her husband, stipulating that the surrogate mother would give birth to an embryo originating from the egg of a donor and the sperm of the French husband. On 27/10/2001 the daughter of the French couple was born. By virtue of a ruling issued on 31/10/2001, a Court in Minnesota held that the surrogate mother's pregnancy served the purpose of bearing a child that would be biologically related to the French husband and that the surrogate mother would not retain any parental rights, which are terminated by virtue of the court decision. On that same day the said Court acting in response to a relevant request lodged by the French couple issued a second ruling, whereby the French husband was recognized as the girl's biological father and holder of parental rights, whereas the surrogate mother and her husband explicitly waived any right of communication with the child. On 01/11/2001 a civil act of birth was issued for the child, quoting the French couple as the girl's parents. Once again on 28/07/2003 the Public Prosecutor Office at the Court of First Instance of Nantes rejected a request filed by the French couple to have the civil act of birth of their child transcribed at the French Registry Office, the only difference between the Menesson vs. France case lying in the fact that in the latter case the French couple attempted to have its filiation to the child recognized by means of an *acte de notoriété* (≈statutory declaration), within the context of an unknown to the Greek law institution of establishment of filiation, namely that of *possession d'état* (=possession of status) (Article 311-3 of the French Civil Code).

V. Allegations of the applicants before the ECHR

Both couples submitted an application before the ECHR, on the grounds that the impossibility of recognition in France of a filiation legitimately established abroad contravenes the supremacy of the interest of the children born abroad through surrogate motherhood method. More specifically, the applicants invoked a violation of the right to private and family life safeguarded under Article 8 of the European Convention of Human Rights (Menesson vs. France, § 43 = Labassee vs. France, § 34).

VI. On the matter of admissibility of the applications

Prior to examining the merits of the applications the Court deemed expedient to formulate the following preliminary considerations as to the admissibility of the invocation of Article 8 of the European Convention of Human Rights: on the one hand, the Court reiterated an earlier adopted position that the invocation of Article 8 of the Treaty presupposes the existence of a family or at least the existence of "de facto" family bonds (Menesson vs. France, § 45 = Labassée vs. France, § 37). On the other hand, the Court found that the right to private life incorporates the right to identity, which comprises not only physical but also social manifestations, such as the filiation status granted to an individual. Furthermore, the Court expressed the view that the respect of private life requires that all individuals be able to establish the details of their identity as human beings (Menesson vs. France, § 46 = Labassee vs. France, § 38).

VII. On the merits of the applications

The Court locates a common legal starting point for both the applicants and the French government in the fact that the denial of the French authorities to allow for the legal recognition of filiation constitutes an "**interference**" with the right to respect for family life, as this term is used under Article 8 (2) of the European Convention of Human Rights (Menesson vs. France, § 48).

However, the first point of legal disagreement for the parties was whether this interference is justified or not. On the one hand, the French government contended that this "**interference**" was "**in accordance with the law**" and in particular with Article 16-7 of the French Civil Code, providing that any surrogacy agreement is null and void (Menesson vs. France, § 55 = Labassee vs. France, § 49).

On the other hand, the main counter-argument of the applicants lies in the fact that the nullity of the surrogacy agreement, provided for under Article 16-7 of the French Civil Code, does not entail the nullity of filiation of children born by means of this method, given that the said filiation was legally established by virtue of a foreign judgment. Subsidiarily, the applicants availed themselves of the fact that the amended Article 47 of the French Civil Code, laying down as an additional requirement for the legality of civil status acts that the facts declared therein correspond to reality, was not in force at the time of birth of the twins. Finally, the applicants insisted that many

other couples who had used surrogacy services abroad had achieved the transcription of similar civil status documents (Menesson vs. France, § 52).

In line with its consistent case-law, the Court referred to the conditions under which an "interference" is regarded in accordance with the law: not only when it is based on domestic law, but also when it is accessible to citizens and foreseeable as to its effects, namely when the law sets forth precisely the conditions under which a measure may be applied, in order to enable the parties concerned to regulate their conduct (Menesson vs. France, § 57). In the present case, the Court holds that these conditions are met. In particular, reminding the fact that Articles 16-7 and 16-9 of the French Civil Code were in force at the time when the material facts of the case heard took place, the Court estimates that the applicants ought to have calculated the serious risk of the French Courts' ruling against their case. At any rate, it should be stressed that in the same paragraph of its ruling the Court makes careful reference to the fact that no provision of the French law explicitly precluded the recognition of filiation. I firmly believe that the aforementioned legal thinking is aimed at paving the way for drawing the dividing line between the nullity of the surrogacy agreement and the nullity of filiation establishment. Finally, the Court found that the applicants failed to adduce any evidence in support of their assertion that the French practice on the matter of recognition of ties of filiation between children born abroad by way of a surrogacy agreement and their parents used to be more liberal (Menesson vs. France, § 58).

The second legal issue addressed by the ECHR was whether such "interference" serves a legitimate aim.

Here the main argument of the applicants is that the initiative of the Public Prosecutor to proceed to the transcription, with a view to subsequently requesting its annulment is contradictory and therefore the French authorities could not be deemed to have pursued a legitimate aim (Menesson vs. France, § 59).

In order to refute the said argument the French government objected that any transcription of the American civil status acts in the French Registry Office would have legitimized a contract forbidden in domestic law by an overriding mandatory provision. In particular, according to the French Government, the said prohibition reflects those ethical and moral principles which do not allow the human body to

become an object of transactions and the child to degrade to an object of a contract. It follows from the above that the contested state "interference" is meant to prevent disorder or crime, to protect health and the rights and freedoms of others (Menesson vs. France, § 60 = Labassee vs. France, § 45).

The ECHR doubts the validity of the allegations of both parties. With regard to the applicants, the Court found no connection between the contradictory behavior of the Public Prosecutor and the fact that the aim pursued with the 'interference' does not fall within those enumerated in Article 8 (2) of the Convention. Regarding the French government, in both cases, the Court restricts the legitimate aims that the State 'interference' pursues to protecting health and the rights and freedoms of others (Menesson vs. France, § 62 = Labassee vs. France, § 54).

The third legal problem tackled by the ECHR was whether the State "interference" was a "necessary measure" in a democratic society.

On the one hand, the applicants challenged directly that the interference *"is necessary within a democratic society*". Their reasoning is predicated on the legal construction of *"margin of appreciation"*, commonly found in the case-law of the ECHR. In that context, the applicants argued that, in the case under consideration, the otherwise wide *"margin of appreciation"* enjoyed by the Member-State parties concerning legal regulation of surrogacy, in view of a lack of a common European approach, should be mitigated (Menesson vs. France, § 63).

First and foremost, the applicants reprove the ruling of the French Court of Cassation before the ECHR not for the incompatibility of the prohibition of surrogacy in France to the Convention, but for the serious repercussions of the said ruling, namely the deprivation of filiation on the children born with this method, especially with their biological father (Menesson vs. France, § 63 and 67). Furthermore, the applicants underline that surrogacy is systematically practiced abroad and therefore a favorable European trend is shaping towards a settlement of similar situations (Menesson vs. France, § 65).

The applicants enrich their line of arguments by spotlighting the contradiction between the negative stance of the French authorities and the positive stance of the French law towards "socio-affective filiation", as implied, for instance, by the permissibility of reproductive material donation to couples for effecting heterologous

artificial insemination, as well as by the ties of filiation established with children born solely on the intention of individuals (Menesson vs. France, § 66).

Finally, the applicants specify the disproportionate consequences that the non-recognition of the ties of filiation for their children entails: the deprivation of a French nationality, of a French passport, of a residence permit, of voting or inheritance rights in the future etc. (Menesson vs. France, § 68).

On the other hand, the French government defends the necessity of the measure in a democratic society, legally entrenched in the expression of the general will of the French people to proscribe any possibility of commercialization of the human body, to guarantee respect for the principle of inalienability of the human body and of personal status and to protect the child's best interest (Menesson vs. France, § 72 = Labassee vs. France, § 47). In addition, the French government questions prioritizing the biological criterion in the relationship of the twins with their father for the legal recognition of the ties of filiation between them. In other words, the French government is of the opinion that it is in the children's interests the ties of filiation with both parents to be placed on the same level of legal recognition (Menesson vs. France, § 72).

In view of the wide margin of appreciation and the fact that the applicants lead a normal life on the basis of the American civil status of the children as well as the fact that their best interests are protected, the French Government perceives the interference in the exercise of the right of Article 8 of the Convention as "*entirely proportionate*" to the aims pursued (Menesson vs. France, § 73 = Labassee vs. France, § 47).

Finally, in order to dispel any impressions about the gravity of the consequences of the negative stance of the French authorities towards the couple, the French government deploys the argument that, in so far as they meet the requirements of Article 47 of the French Civil Code and irrespective of their transcription, foreign civil acts produce effects in France, particularly regarding proof of the filiation stated (Menesson vs. France, § 74).

At this point, the ECHR is inclined to the applicants' argumentation. The opinion of the ECHR is in line with its established case-law on the "margin of appreciation". The ECHR reiterates that the Member-States' margin of appreciation

varies according to the circumstances, the subject matter and the context and that the existence or not of common ground between the legal systems of contracting Member-States is a contributory factor. Accordingly, on the one hand, where there is no consensus within the Member-States of the Council of Europe, either as to the importance of the interest at stake or as to the best means of protecting it, particularly where the case raises sensitive moral or ethical issues, the margin will be wide. On the other hand, where a particularly important facet of an individual's existence or identity is at stake, the margin allowed to the State will be restricted (Menesson vs. France, § 77 = Labassee vs. France, § 56).

In the case under consideration, even though the Court observes a lack of consensus among the contracting Member-States with regard to the issue of surrogacy (Menesson vs. France, § 78 = Labassee vs. France, § 57) and consequently it accepts a wide margin of appreciation to be afforded to France concerning the decision whether or not to authorize this method and whether or not to recognize the ties of filiation created under these circumstances (Menesson vs. France, § 79 = Labassee vs. France, § 58), the Court places increased emphasis on the fact that an essential aspect of human identity is at stake, namely filiation, before reaching its final conclusion that the margin of appreciation needs to be mitigated (Menesson vs. France, § 80 = Labassee vs. France, § 59). In support of its assessment, the ECHR reminds to the contracting Member-States that their choices, even within the limits of this margin of appreciation, are not beyond the scrutiny of the Court. The criterion for evaluating the solutions adopted by each national legislation shall be whether a fair balance has been struck between the interests of the State and those of the individuals. Finally, whenever children are involved, their best interests are of paramount importance (Menesson vs. France, § 81 = Labassee vs. France, § 60).

In order to verify whether the solution adopted in the French legal system regarding the issue at hand reflects a fair balance between collective and individual interests, the Court uses the criterion of whether the interests of the applicants (the children's included) were taken into consideration, in the form of their rights to respect for their private and family life (Menesson vs. France, § 84 = Labassee vs. France, § 63). At this point, the Court aptly distinguishes between the right to respect for family life of all applicants (parents and their children) and the right to respect for

private life of the children solely (Menesson vs. France, § 86 = Labassee vs. France, § 65).

In more detail, the ECHR thoroughly investigates the allegations on the part of the applicants of the extent to which the non-recognition of the ties of filiation between parents and children affects their family life, namely whether it renders their family life more complicated due to the formalities required on various occasions in their life (Menesson vs. France, § 87 = Labassee vs. France, § 66). In the case under consideration, the Court estimates that the difficulties invoked by the applicants are not insurmountable (Menesson vs. France, § 92 = Labassee vs. France, § 71), namely they do not exceed the limits imposed by the respect for Article 8 of the European Convention of Human Rights (Menesson vs. France, § 93 = Labassee vs. France, § 72). By extension, the ECHR judges that the French Court of Cassation strikes a fair balance between the interests of the applicants and those of the State, as far as their right to respect for family life is concerned (Menesson vs. France, § 94 = Labassee vs. France, § 73).

The ECHR expresses a diametrically opposing view concerning the right to respect for the private life of children, by presenting the following line of argument. Firstly, the Court stigmatizes the position of legal uncertainty in which the children are found, in conjunction with the contradictory stance of France, which, while recognizing that in the USA they are children of the applicants, denies a similar recognition under the French law (Menesson vs. France, § 96 = Labassee vs. France, § 75). Secondly, the Court classifies the element of nationality as a fundamental element of individual identity (Menesson vs. France, § 97 = Labassee vs. France, § 76) in relation to which, as above-mentioned, the same Court held that the margin of appreciation of the contracting Member-States is limited. Thirdly, albeit understanding that France may wish to deter its nationals from travelling abroad to use methods of assisted reproduction prohibited within its own territory (Menesson vs. France, § 99 = Labassee vs. France, § 54), the Court cannot overlook the fact that the effects of the non-recognition of the ties of filiation between the children and the intended parents are not restricted to parents alone, but also extend to children themselves. Given that the interest of the child has already been established as an utmost value, the Court weighs that France has exceeded its margin of appreciation (Menesson vs. France, § 99 = Labassee vs. France, § 78). In consequence, the Court

holds that the non-recognition of the biological reality as filiation is inconsistent with the interests of the children (Menesson vs. France, § 100 = Labassee vs. France, § 79).

VIII. For these reasons…

In the light of the above considerations, the Court reaches the conclusion that there has been no violation of Article 8 of the European Convention of Human Rights with regard to the applicants' right to respect for their family life, but there has been a violation of Article 8 of the Convention only with regard to the right to respect for the private life of the children born (Menesson vs. France, § 102 = Labassee vs. France, § 81). It is noteworthy that in the Menesson vs. France case the Court rejected the applicants' request of an alleged violation of Articles 8, 6 (1) and 12 of the Convention by the French government.